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CASE NO. 82-745

in the Supreme Court of the United States

October Term 1982

GREYHOUND RENT-A-CAR, INC.,
Petitioner,

vs.

CITY OF PENSACOLA, and
DOLLAR RENT-A-CAR SYSTEM, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT CITY OF PENSACOLA IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner claims the record presents the following questions:

1. Whether an agreement negotiated with the City attorney by one of five bidders (Dollar) for four airport car rental concessions to indemnify potential violations of the federal antitrust laws if the City would reject a competing bid (Greyhound) *cannot*, as a matter of law, constitute an agreement under §1 of the Sherman Act?

2. Whether an indemnity agreement, embracing prospective violations of the antitrust laws, so fundamentally subverts the national public policy as to be sufficient evidence in quantum and quality of the element of agreement in a §1 Sherman Act private civil action?

3. Whether the opinion of the Court of Appeals for the Eleventh Circuit should be summarily vacated for failure to follow on rehearing the intervening decision of this Court in *American Society of Mechanical Engineers Inc. v. Hydrolevel Corp.*, ___ U.S. ___, 102 S.Ct. 1935 (1982)?

The Respondent, City of Pensacola, contends that none of the above three questions is actually presented by the record.

LISTING PURSUANT TO SUPREME COURT RULE 28.1

The Respondent City has nothing to add to the listing of the parties provided by Petitioner.

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OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 676 F.2d 1380. The Eleventh Circuit's memorandum order denying rehearing is not reported. Both the opinion and the order denying rehearing are reproduced in the Appendix to the Petition. The Appendix also contains a copy of the final judgment entered upon the jury's verdict for Respondents in the trial court.

GROUNDS FOR INVOKING JURISDICTION OF COURT

The judgment of the Court of Appeals was entered on May 28, 1982. A timely petition for rehearing, for which a timely request for enlargement of time had been granted, was denied on August 2, 1982. Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1337(a). Jurisdiction in this Court exists under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Respondent City operates the Pensacola Regional Airport. On January 15, 1979, it opened sealed bids for on-airport car rental concessions. There were five bidders,[1] and the Respondent City planned to award no more than four concessions at the airport to the highest bidders. The Respondent Dollar was the low bidder. When bids were opened and it was learned that Greyhound had submitted a bid, Dollar protested Petitioner's bid on the ground that Petitioner failed to

[1]Bids were submitted by Hertz, Avis, National Car Rental, Petitioner, and the Respondent Dollar.

meet the performance ability specifications in the bid package. One of these specifications was that the bidder "must have been engaged in the auto rental business on a national scale for at least five years immediately prior to the date its bid is submitted." Petitioner had only done business in Florida, Georgia, Louisiana, and Arizona during the five year period in question.

When the dispute arose, the City Manager of the Respondent City conferred with the airport manager and the city attorney. Thereafter, the city manager advised a committee of the city council that petitioner should be disqualified because it had not satisfied the "doing business on a national scale" requirement, which was determined to be a material part of the specifications.

On February 5, 1979, there was a meeting of the Pensacola City Council. At this meeting, Petitioner contested its disqualification as a bidder; the City Attorney advised the city council that, based upon his independent legal research, the most appropriate definition of operating on a "national scale" meant doing business in more than one-third of the states; and a lawyer for Respondent Dollar advised the council that he saw no antitrust liability on Respondent's part if Petitioner's bid were rejected.

The Council deferred action for two weeks pending further investigation. During this interval:

> . . . the city attorney approached Dollar's local counsel about Dollar's indemnifying the City from any lawsuit resulting from invalidation of Greyhound's bid. Transcript, vol. X, Testimony of Don Caton at 50. In response Dollar's vice-

president sent a telegram to Dollar's local counsel authorizing him 'acting on behalf of Dollar Rent-a-Car Systems, Inc. to enter an indemnification agreement with the City of Pensacola . . . [to] indemnify the City from any lawsuits or claims resulting from the rejection of the bid of Greyhound Rent-a-Car by the City of Pensacola.' Plaintiff's Exhibit 158. In turn Dollar's local counsel provided the city attorney with a letter reciting his authority to indemnify the City for 'all costs and damages which may be assessed against the city in the event the contract . . . is awarded to Dollar, and complaint or other form of legal action is taken against the city by reason thereof.' Plaintiff's Exhibit 157. Finally on February 22, 1979, the council voted, without any discussion of indemnification, to award the concession contracts to Hertz, National, Avis, and Dollar. Plaintiff's Exhibit 50 at 27.

Thereafter, Petitioner sued Respondents in the United States District Court for the Northern District of Florida claiming the Respondents had violated §1 of the Sherman Act, 15 U.S.C. §1. According to Petitioner, the Respondents contracted, combined or conspired to exclude Petitioner from obtaining a car rental concession at the airport. The case was tried before a jury which found for the Respondents. Final judgments were entered for Respondents. Petitioner then appealed to the United States Court of Appeals for the Eleventh Circuit.

On appeal, Petitioner attempted to raise questions concerning evidentiary rulings and jury instructions.

The Eleventh Circuit declined to rule on any of these questions, stating:

> We affirm the entry of judgment against Greyhound because we conclude there was insufficient evidence to establish any contract, combination, or conspiracy between Dollar and the City within the meaning of §1 of the Sherman Act. Greyhound having failed to prove the first element of its §1 claim, we need not therefore address the challenges it presents to the jury instructions and to the admission and exclusion of evidence unrelated to the issue of agreement. (676 F.2d at 1383).

In reaching the above conclusion, the Eleventh Circuit reasoned as follows:

> . . . The facts of this case raise three possible theories for alleging a concert of action or conspiracy between the City and Dollar. Each is unavailing for Greyhound.
>
> First, had Dollar induced the City to insert the national specifications in the bid packages, Greyhound could have cleared at the least the first hurdle of its §1 claim. Similarly if Dollar had induced the City to adopt a definition of 'nationa' scale' that would automatically disqualify Greyhound as a bidder, the element of combination would be satisfied. But evidentiary support for either of these theories is lacking. There is clear, uncontradicted testimony that the City had no discussion or

contact with any of the bidders regarding use of the national specifications. Transcript, vol. XII, Testimony of Edmond R. Hinkle at 168-69; Depositions, vol. IX, Deposition of Gary Paxton at 83, 94-95; Transcript, vol. XIII, Testimony of James Reeves at 352. Furthermore, the definition of operating on a 'national scale' as requiring business in more than half the states was solely the product of the city attorney's independent research. Transcript, vol. X, Testimony of Don Caton, at 36, 77.

The most promising theory, and the one on which Greyhound relies, is that the indemnity agreement between Dollar and the City reflects the defendants' commitment to a common course of action, namely the City's exclusion of Greyhound and award of a contract to Dollar in exchange for Dollar's payment of any damages and costs incurred in legal proceedings arising from the City's actions. Greyhound would have us view the indemnity agreement as reading in effect: 'For and in consideration of Dollar's promise to indemnify, the City hereby promises to reject the bid of Greyhound Rent-a-Car.' This interpretation of the agreement cannot be supported by either the language of the agreement or by an inference drawn from the City's subsequent decision to disqualify Greyhound's bid.

The language of the agreement reveals that the City did not commit itself either to reject Greyhound or to any other particular course of action. It was Dollar which committed itself

to certain conduct—namely, indemnification of the City *in the event that* the City chose, for whatever reason, to reject Greyhound and litigation ensued. Furthermore, there is nothing in the record to suggest that the city council's ultimate decision to reject Greyhound was induced or supported by the indemnity agreement with Dollar. . . . (676 F.2d at 1383-1384).

After denial of its motion for rehearing, Petitioner now seeks review by certiorari in this Court.

REASONS FOR DENYING THE WRIT

The Respondent City urges the Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit for the following reasons:

1. None of the questions Petitioner seeks to raise is actually presented by the Record. In seeking to raise these questions, Petitioner merely assumes as true matters which a jury and the Eleventh Circuit could find no support in the Record.

2. In Questions 1 and 2, Petitioner incorrectly assumes that the Respondent City agreed to reject Greyhound's bid for and in consideration of Respondent Dollar's promise to indemnify against a potential antitrust violation. However, as noted in the Eleventh Circuit's opinion below:

> . . . This interpretation of the agreement cannot be supported by either the language of the

agreement or by any inference drawn from the City's subsequent decision to disqualify Greyhound's bid.

The language of the agreement reveals that the City did not commit itself either to reject Greyhound's bid or to any other particular course of action . . . (676 F.2d at 1384).

Indeed, the City Council did not even know of the telegram and letter in question which has been referred to as an "agreement" when it voted to reject Petitioner's bid. The reason that Petitioner's bid was rejected was that Petitioner was not physically capable of providing a consistently high level of service to the travelling public which combines maximum convenience to the public, uniform ability to provide service throughout the United States, and a common basis for competition among the concessions, as required by the "national scale" specification (676 F.2d, 1381, 1382 and 1384).

The Eleventh Circuit specifically states in Footnotes 10 and 11 on page 1384 that they were expressing no opinion as to the enforceability of Dollar's promise or "agreement" to indemnify since that was not a question that was before the Court. Petitioner now improperly seeks to present that question to this Court.

3. In Question 3, Petitioner claims the opinion below conflicts with the Court's opinion in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, ____ U.S. ____, 102 S.Ct. 1935 (1982). Petitioner made the same claim in its petition for rehearing before the Eleventh Circuit. In that case, this Court held a principal could be subjected to antitrust liability for

acts of his agent performed with apparent authority. That holding has no possible application to the instant facts. There is no evidence that the City Attorney promised anything from the City Council in return for an indemnity agreement. Hence, no question of apparent authority is presented by the Record.

4. The result below is right and just. A city's decision to require car rental companies at a regional airport to do business on a national scale makes complete good sense and in this case is amply supported by testimony and documents contained in the Record. Indeed, on the appeal below, Petitioner abandoned any claim to the contrary, as noted in Footnote 8 of the opinion below.

CONCLUSION

The Respondent City respectfully submits that the petition should be denied.

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